RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

—v.—

TEXAS,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF TEXAS, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU of Texas is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in considering the constitutionality of Texas's procedures for identifying people with intellectual disability who are exempt from execution under the Eighth and Fourteenth Amendments. Given the ACLU's longstanding interest in the protections contained in the Constitution, including the Eighth Amendment's prohibition against cruel and unusual punishment, the proper resolution of this case is a matter of substantial importance to the ACLU, its affiliates, and its members.

INTRODUCTION AND STATEMENT OF THE CASE

In *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), this Court held that persons with intellectual disability have diminished moral culpability and thus may not be sentenced to death under the Constitution.[2] In reaching this conclusion, the Court

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[1] Letters of consent from the parties have been submitted to the Clerk of the Court. No party has authored this brief in whole or in part, and no one has made a monetary contribution intended to fund the preparation or submission of this brief, other than amici, its members, and its counsel.

[2] "Intellectual disability" is the term now used to describe what was previously referred to as mental retardation. *Hall v. Florida*, __ U.S. __, 134 S. Ct. 1986, 1990 (2014). This brief uses

relied on a clinical definition of intellectual disability that rests on three findings: (a) significantly subaverage intellectual functioning; (b) significant limitations in adaptive skills; and (c) the manifestation of these deficits prior to the age of 18. *Id.* at 308 n.3, 318.

Texas acknowledges this Court's holding in *Atkins*. *Ex Parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004). But, it has adopted a flawed interpretation of *Atkins* that permits the execution of individuals who are in fact intellectually disabled and that *Atkins* intended to exempt from the death penalty. To qualify for an *Atkins* exemption in Texas, it is not enough for a defendant to demonstrate that he is intellectually disabled, as that term is understood by the medical profession. An intellectually disabled defendant facing the death penalty in Texas must also show "that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Ex Parte Briseno*, 135 S.W.3d at 6.

In other words, the *Atkins* inquiry in Texas does not turn on clinical criteria to establish that the defendant is intellectually disabled, but on whether the defendant is intellectually disabled enough to convince "a consensus of Texas citizens" that it would be wrong to impose a sentence of death. Under *Briseno*, a person who meets the clinical definition of intellectual disability may still be eligible for the death penalty if he fails to prove that his adaptive

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the current term, except when quoting from older opinions or materials that used "mental retardation."

deficits are *not* indicative of a personality disorder. *Id.* at 8-9.[3]

As an example of a person "[m]ost Texas citizens might agree . . . should . . . be exempt" from the death penalty, *Briseno* invokes the character Lennie from John Steinbeck's *Of Mice and Men*. *Id.* at 6. Drawing guidance from this fictional character, rather than science, *Briseno* then announces a series of "evidentiary factors" for Texas courts to consider in applying *Atkins*:

> • Did those who knew the person best during the developmental stage – his family, friends, teachers, employers, authorities – think he was mentally retarded at that time, and, if so, act in accordance with that determination?

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[3] It is unclear why the CCA in *Briseno* raised the specter of prisoner personality disorders masking as intellectual disability. As shown below, the two are not inconsistent. *See Brumfield v. Cain*, __ U.S. __, 135 S. Ct. 2269, 2280 (2015). That may explain why the *Briseno* factors in subsequent decisions were often used to evaluate the sufficiency of a prisoner's adaptive deficits, rather than as a way of excluding those whose deficits were attributable exclusively to personality disorder. *See, e.g., Chester v. Thaler*, 666 F.3d 340, 346 (5th Cir. 2011) (describing factors as a means "to flesh out the [American Association on Mental Retardation (AAMR)] definition to determine whether the convict falls within *Atkins* so as to be protected against the death penalty"). Indeed, below, the CCA applied the *Briseno* factors even though no party had alleged that Moore suffered from a personality disorder. Pet. App. 161a-162a, ¶94. Under either approach, the factors find no support in science.

- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Id. at 8-9.

These factors closely reflect not science, but the characteristics of the hulking farmhand Lennie, who appears in the novella to have a severe form of disability. Lennie (or someone like him) easily meets the first factor, and each subsequent factor proposes an ability that Lennie would not have, contrasted against a deficit that he would have. As shown in greater detail in this brief, throughout the novel, Lennie acts on impulse, not plans, including at the climax when he commits a homicide. Rather than a leader, he is the classic follower, forever imitating his

travel partner (and caretaker) George. Lennie responds irrationally to stimuli, driven by an obsession to care for and touch soft things. He cannot carry on rational conversations, but instead often returns to the topic of his obsession. Every lie Lennie tells (most involving hiding his obsession with furry animals) is readily transparent and instantly spotted by George. Texas has derived its *Briseno* factors from these stereotypes of people with intellectual disability like Lennie.

As applied in Texas, anecdotal evidence of any of the "abilities" set out in the *Briseno* factors weighs against a finding of intellectual disability. *See, e.g.*, *Chester*, 666 F.3d at 348-49 (acknowledging the evidence of prisoner's subaverage intellectual functioning and onset of condition before age 18 but rejecting prisoner's ample evidence of significant adaptive deficits under accepted clinical standards by relying instead, under *Briseno*, on evidence from the crime showing prisoner could "plan, avoid detection, and lie[,]" and attempt (unsuccessfully) to escape from the police, as well as expert testimony that he could communicate clearly).

The CCA in this case relied in part on the *Briseno* factors to deny Petitioner relief. Pet. App. at 89a-91a. In so doing, it rejected the dissent's call "to reevaluate the decade-old, judicially created standard in *Ex parte Briseno*," as inconsistent with both medical science, including current medical standards, and the approach recently taken by this Court in *Hall*, 134 S. Ct. at 1993-96. Pet. App. at 94a.

The dissent's critique also zeroed in on Steinbeck's Lennie: "In referring to Lennie as someone who might be exempt from execution

whereas others unlike him would not be, this Court's opinion has been read as implying or holding that those individuals who are less than severely or profoundly intellectually disabled would not be exempt from execution." Pet. App. at 117a. The dissent then went on to explain, "the Lennie standard does not meet the requirements of the federal Constitution because it . . . categorically limits the protections of the Eighth Amendment to those offenders determined to be severely or profoundly intellectually disabled." Pet. App. at 118a.

For economy, *Amici* adopt the additional facts set forth in Petitioner's merits brief concerning his intellectual disability and the proceedings below.

SUMMARY OF ARGUMENT

Under this Court's precedent, the Eighth and Fourteenth Amendments forbid the execution of any person with intellectual disability. *See Atkins*, 536 U.S. at 321; *Hall*, 134 S. Ct. at 1990. Under Texas precedent, however, persons with intellectual disability face an unacceptable and therefore unconstitutional risk of execution. *See Ex Parte Briseno*, 135 S.W.3d at 8-9 (setting forth seven-factor, judge-made test, commonly referred to as "the *Briseno* factors"). The CCA set out its *Briseno* factors to provide guidance on an impermissible Texas-specific application of *Atkins*. *Id.* at 6 (purporting to "define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty").

Rather than resting on the "views of medical experts," *Hall*, 134 S. Ct. at 2000, the *Briseno* factors

reflect a damaging and inaccurate stereotype drawn from literature. Because offenders with intellectual disability who have committed capital crimes virtually all fall in the mild range of disability, *see* notes 6&7, *infra*, the patently-disabled person who matches this literary stereotype and qualifies for relief would be rare. And, as shown in greater detail below, this stereotype appears to be based on Lennie, the slow-witted, lumbering giant, who is a classic follower, given to poor judgment, incoherent speech, and acts based on impulse and irrational fantasy.

Petitioner and other *amici* persuasively show that the criteria used by the CCA to deny *Atkins* relief clash with science and medicine. We do not repeat those arguments here. Instead, this brief focuses on the consequences of the decision that Texas has made. First, reliance on the *Briseno* factors unconstitutionally excludes persons with mild intellectual disability from *Atkins*' protection. Second, and relatedly, the *Briseno* factors undermine the reliability and fairness required in capital procedures, create arbitrary outcomes, and trample the dignity of persons seeking *Atkins* relief.

The death penalty must be based on reason, not caprice. *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (citations omitted). Persons with intellectual disability facing execution thus "must have a fair opportunity to show that the Constitution prohibits" the death penalty in their cases. *Hall*, 134 S. Ct. at 2001. Further, although the "States are laboratories for experimentation," such experiments "may not deny the basic dignity the Constitution protects." *Id.* Based in stereotypes, imagination, and literary

caricature, the *Briseno* factors mock these constitutional tenets of our justice system.

Because the CCA unconstitutionally relied in part on the *Briseno* factors to deny petitioner *Atkins* relief,[4] its judgment should be vacated. The case should be remanded to afford petitioner a new and fair opportunity to pursue his *Atkins* claim.

ARGUMENT

I. THE *BRISENO* FACTORS UNCONSTITUTIONALLY SEEK TO EXCLUDE "NON-DESERVING" INTELLECTUALLY DISABLED PERSONS FROM *ATKINS* PROTECTION.

Briseno's fundamental premise is that, in the absence of contrary guiding legislation, Texas may execute certain persons with mild intellectual disability. 135 S.W.3d at 6-8. (citing, *inter alia*, lack of legislation implementing *Atkins*).[5] Its rationale is that the Eighth Amendment does not necessarily bar such executions. *Id.* at 5. The tool proposed to

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[4] *See* Pet. App. at 89a-91a (applying *Briseno* factors to buttress conclusion Petitioner is not disabled). As Petitioner's brief explains, the problems in the CCA's ruling below go beyond application of the *Briseno* factors. The ruling also errs in other parts of the intellectual disability determination, all of which fall under the rubric of a refusal to apply current medical standards.

[5] While the CCA continued in the decision below to place great weight on the failure of the Texas Legislature to act to implement *Atkins*, Pet. App. at 5a,7a, the dissent correctly noted that the court was abdicating its own "responsibility to ensure that federal constitutional rights are fully protected in Texas." Pet. App. at 95a n.2.

accomplish the macabre task of sorting between those persons with intellectual disability who "deserve" the death penalty and those who do not is the seven-factor test announced in *Briseno*. *Id.* at 8-9.

Briseno, however, is faulty in its premise, in its rationale, and in its supposition that the Texas courts may, with their own judge-made standards, sort those deserving of execution from those who are not.

To begin, the CCA in *Briseno* misinterpreted *Atkins* as permission for Texas to execute people with mild intellectual disability. This is startling: Not only do the overwhelming majority of persons with intellectual disability fall in the mild range,[6] but also people with moderate or severe disability would rarely, if ever, have the capacity to commit capital crimes.[7] The CCA found permission to exclude those with mild intellectual disability based on a faulty chain of reasoning. First, it quoted this observation from *Atkins*: "'[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.'" 135

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[6] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 43 (4th ed. Text Rev. 2000) (placing the figure at 85%); Gary Siperstein & Melissa Collins, *Intellectual Disability, in The Death Penalty and Intellectual Disability* 21 (Edward Polloway ed. 2015) (placing the figure at 89%).

[7] J. Gregory Olley, *Knowledge and Experience Required for Experts in Atkins Cases*, 16 Applied Neuropsychology 135,136-37 (2009); Frank M. Gresham, *Interpretation of Intelligence Test Scores in Atkins Cases: Conceptual and Psychometric Issues*, 16 App. Neuropsych. 91, 92 (2009).

S.W.3d at 5 (quoting *Atkins*, 536 U.S. at 317). It then quoted this Court's directive tasking the States with "'developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.'" *Id.* (quoting *Atkins*, 536 U.S. at 317).

Next, the CCA noted the "large and diverse population suffering from some sort of mental disability" and the four subcategories of mental retardation, including "mildly mentally retarded, moderately mentally retarded, severely mentally retarded, and profoundly mentally retarded," *Id.* at 5. "Some 85% of those officially categorized as mentally retarded," the court noted, "fall into the highest group, those mildly mentally retarded[.]" *Id.*

The CCA noted that the "functioning level of those who are mildly mentally retarded is likely to improve with supplemental social services and assistance." *Id.* at 6. It then speculated – without citation or authority – that it is "understandable that those in the mental health profession should define mental retardation broadly to provide an adequate safety net for those who are at the margin and might well become mentally-unimpaired citizens if given additional social services support." *Id.*

Having laid this foundation, the CCA concluded that the court *itself* must "define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Id.* The CCA believed the question remained open whether there is "a national or Texas consensus that *all of those persons* whom the mental health profession might diagnose as meeting the criteria for mental retardation" must be spared execution. *Id.*

(emphasis added). The court declined to adopt such a "bright-line exemption[,]" without "significantly greater assistance from the citizenry acting through its Legislature." *Id.* at 6. *See also Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012) ("Answering questions about whether the defendant is mentally retarded for particular clinical purposes is instructive as to whether the defendant falls into the 'range of mentally retarded offenders' protected by the Eighth Amendment, but it will not always provide a conclusive answer to that ultimate legal question.").

The CCA in *Briseno* recognized that the Texas Legislature had *already* defined intellectual disability in other contexts. 135 S.W.3d at 7 (citing Tex. Health & Safety Code § 591.003(13) (defining intellectual disability as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period")). But, it questioned the use of a definition in the *Atkins* context "for providing psychological assistance, social services, and financial aid," *id.* at 8, and noted that legislation adopting this statutory definition in the capital context had been vetoed by Texas's Governor. *Id.* at 6. Instead, the CCA stated that, absent legislation, it would apply the statute's criteria, or the similar criteria of the AAMR[8] – yet with a critical qualification lacking any basis in science. *Id.* at 8.

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[8] In practice, however, Texas has not faithfully applied the up-to-date criteria of the AAMR (which later became the American Association on Intellectual and Developmental Disabilities (AAIDD)), the statute, or other relevant professional

That qualification is to apply the seven unscientific *Briseno* factors. *See* pp. 3-4, *supra*. Thus, the CCA – again without citation or authority – found that "adaptive behavior criteria are exceedingly subjective, and undoubtedly experts will be found to offer opinions on both sides of the issue in most cases." *Id.* It then listed the "evidentiary factors which factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder," *id.*, even though the presence or absence of a personality disorder is medically irrelevant to the diagnosis of intellectual disability. *See* n.3, *supra*.

Briseno's reasoning is faulty in both its premise and its conclusion. Nothing in the *Atkins* decision, or this Court's decisions applying *Atkins*, stands for the proposition that some or all of those with mild intellectual disability are ineligible for the *Atkins* exemption from execution. The portions of *Atkins* the CCA quoted merely indicate that a *claim* of intellectual disability in the state courts is subject to adjudication under state-court procedures. *Atkins*, 536 U.S. at 317. Deciding who is intellectually disabled is very different from disqualifying those who are intellectually disabled from the constitutional protection that *Atkins* provides. In *Atkins* itself, the death-row petitioner was "'mildly mentally retarded,'" 536 U.S. at 308, and the thrust of the dissent was that the majority was going too far in exempting from execution those with mere "mild" disability. *Id.* at 338-42 (Scalia, J., dissenting). All of

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organizations concerned with intellectual disability. The briefs of Petitioner and other *amici* illustrate these failures in detail.

this would have been academic, not to mention confusing, if the Court had meant for the new categorical exemption from execution to *exclude* some or all of those with mild intellectual disability.

The Court reaffirmed this approach in *Brumfield*, 135 S. Ct. at 2278, finding the petitioner, with a "reported IQ test result of 75 . . . squarely in the range of potential intellectual disability." *Id.* (citing, *inter alia*, *Atkins*, 536 U.S. at 309 n.5). The Court ruled that Brumfield had been improperly denied a hearing on his *Atkins* claim, a ruling that would be inexplicable if *Atkins* could be read to allow the execution of those with mild intellectual disability. *See also Hall*, 134 S. Ct. at 2001 ("Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test.").

The Court in *Brumfield* also debunked the suggestion in *Briseno* that the *Atkins* protections do not apply to those whose adaptive deficits could be attributed to "a personality disorder." *Ex parte Briseno*, 135 S.W.3d at 6. As *Brumfield* makes clear, "an antisocial personality is not inconsistent with any of the above-mentioned areas of adaptive impairment, or with intellectual disability more generally." *Brumfield*, 135 S. Ct. at 2280 (citing clinical definitions and criteria).

Finally, the Constitution forecloses Texas's attempt, post-*Atkins*, to "define that level and degree of mental retardation at which a consensus of *Texas* citizens would agree that a person should be exempted from the death penalty." *Ex parte Briseno*, 135 S.W.3d at 6 (emphasis added). Texas, after all, was one of the states – running against the national consensus recognized in *Atkins* – that had failed to

pass legislation exempting those with intellectual disability from execution. *Ex parte Briseno*, 135 S.W.3d at 6 (noting Governor's veto of 2001 legislation that would have exempted those with intellectual disability from execution); *Atkins*, 536 U.S. at 315 n.16 (same).

No state holds authority to substantively define the contours of the Eighth and Fourteenth Amendment protections this Court recognized in *Atkins*. The Court in *Atkins* acted precisely because it determined there was a national consensus against the execution of those with intellectual disability, even considering that certain jurisdictions, like Texas, still retained the death penalty for this population. *Id.* at 316-17. It is antithetical to the Court's careful Eighth Amendment jurisprudence to afford the very states with whom the Court was disagreeing the authority to redefine what should be a categorical exemption from execution. *See also Hall*, 134 S. Ct. at 1998 ("*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.").

II. THE *BRISENO* FACTORS VIOLATE THE CONSTITUTION BY RELYING ON A STEREOTYPED DESCRIPTION OF INTELLECTUAL DISABILITY MODELED ON STEINBECK'S CHARACTER LENNIE.

The Constitution limits Texas's authority to "'develop[] appropriate ways to enforce the constitutional restriction'" against the execution of those with intellectual disability. *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). *See Hall*, 134 S. Ct. at 1998 (noting the

states' discretion is not "unfettered"). As shown below, the *Briseno* factors ignore these limits. By relying on stereotype, fiction, and caricature, they promote unreliable and arbitrary outcomes, and deny defendants seeking *Atkins* protection the inherent dignity guaranteed to all persons by the Constitution.

A. The *Briseno* Factors Impermissibly Rely On Nothing But Stereotypes And Caricature From Literature.

For those with intellectual disability, "much has changed in recent years, but much remains the same; outdated statutes are still on the books, and irrational fears or ignorance, traceable to prolonged social and cultural isolation [of persons with intellectual disability] . . . continue to stymie recognition of [their] dignity and individuality." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 467 (1985) (Marshall, J., concurring and dissenting). The common stereotype is of a person with profound and obvious mental deficits, sometimes physically evident. The incorrect perception is that these "individuals never have friends, jobs, spouses, or children or are good citizens." AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Support* 151 (11th ed. 2010). A person with Down Syndrome may come to mind, or perhaps one who cannot wash or dress herself, or handle money. *See* Gary Siperstein & Melissa Collins, *Intellectual Disability, supra,* at 21, 29. He may be described as "quiet, timid, unintelligent, abnormal, strange, helpless, and clumsy[.]" John Blume & Karen Salekin, *Analysis of* Atkins *Cases, in The Death Penalty and Intellectual*

Disability 37, 43. The model is a person dependent on others, with awkward speech patterns and odd mannerisms. *Id.*

Popular culture reinforces these images in our collective consciousness. Title characters from the cinema exemplify the pervasive stereotype, such as *Forrest Gump* with Tom Hanks,[9] and *I am Sam* with Sean Penn.[10] In the 1981 CBS television drama, *Bill,* Mickey Rooney played Bill Sackter, a formerly institutionalized man, with an IQ of 50, who survives with the help of a kind family he meets in the community.[11] Corky from the TV show *Life Goes On* provides the example of a lovable teen with Down Syndrome.

For the author of the *Briseno* opinion, Judge Cathy Cochran (now retired), the classic example was a character with severe disability, Lennie, in John Steinbeck's *Of Mice and Men* (1937). *See Ex parte Briseno,* 135 S.W.3d at 6 & n.19 (citing Lennie as a person "[m]ost Texas citizens might agree . . . should . . . be exempt").

In a 2013 interview about this reference, Judge Cochran explained that, as a child, she lived in rural California and, as a young woman, she lived in Monterey, above Cannery Row (title of and inspiration for another Steinbeck novel). *See* Julia Barton, *Judging Steinbeck's Lennie, Life of the Law,*

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[9] Blume & Salekin, *Analysis of* Atkins *Cases, in The Death Penalty and Intellectual Disability* 41.

[10] Stephen Greenspan, *The* Briseno *Factors, in The Death Penalty and Intellectual Disability* 219, 226.

[11] *Id.* at 226.

(Sept. 3, 2013), http://www.lifeofthelaw.org/2013/09/judging-steinbeck-lennie/. Judge Cochran recalled that while living above Cannery Row, she "re-read all of Steinbeck[.]" *Id.* When she later authored the *Briseno* opinion she thought of Lennie, "sort of the gentle giant" who did not "realiz[e] what he was doing, not knowing the consequences[.]" *Id.* Judge Cochran said she believed "that's part of what was behind the *Atkins* case as well[.]" *Id.*

Judge Cochran explained in the interview that, in writing *Briseno*, and trying to reconcile Texas law and the professional definitions of intellectual disability, Lennie came to mind. *Id.* [12]

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[12] Responding to Judge Cochran's comments, Steinbeck's son, Thomas, stated:

> I had no idea that the great state of Texas would use a fictional character that my father created to make a point about human loyalty and dedication, i.e., Lennie Small from "Of Mice and Men," as a benchmark to identify whether defendants with intellectual disability should live or die.
>
> My father was a highly gifted writer who won the Nobel Prize for his ability to create art about the depth of the human experience and condition. His work was certainly not meant to be scientific, and the character of Lennie was never intended to be used to diagnose a medical condition like intellectual disability. I find the whole premise to be insulting, outrageous, ridiculous and profoundly tragic. I am certain that if my father, John Steinbeck, were here, he would be deeply angry and ashamed to see his work used in this way.

See Robert Mackey, *Steinbeck Family Outraged That Texas Judge Cited 'Of Mice and Men' in Execution Ruling*, N.Y. Times (Aug. 8, 2012), http://thelede.blogs.nytimes.com/2012/08/08/steinbeck-family-outraged-texas-judge-cited-of-mice-and-men-in-execution-ruling/?_r=0. *See also* Alan Turing, *Steinbeck's Son*

Judge "Cochran believe[d] her ruling balances criminals' claims of mental retardation against a Texas culture that encourages speedy executions." *Id.*

As Judge Cochran's interview suggested, the Lennie reference was not merely "an attempt to write colorfully gone awry[.]"Pet. App. at 116a (Alcala, J., dissenting). Rather, it was a directive that, in Texas, only "the most profoundly disabled" and some of those "moderately disabled" would be entitled to *Atkins* protection. The "opinion has been read as implying or holding that those less than severely or profoundly intellectually disabled would not be exempt from execution." Pet. App. at 117a.

Steinbeck's Lennie is a powerfully-built, but mentally-deficient, itinerant ranch hand. He partners with George, a fellow laborer in whose care Lennie's Aunt Clara had left him before she died. The pair is driven by a dream, frequently sketched out by George: they will save their meager earnings to one day buy their own farm together, and become their own bosses. For Lennie, the most important part of this dream is that George will allow him to care for a clutch of furry rabbits. Lennie's obsession with the rabbits, and with petting other things furry and soft, drives the story, causes much of his troubles, and leads to the tragic climax.

Lennie becomes frightened because he has accidentally killed a furry farmyard puppy he had

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Joins Fight Over Wilson's Execution, Beaumont Enterprise, (Aug. 7, 2012), *available at* http://www.beaumontenterprise.com/news/article/Steinbeck-s-son-joins-fight-over-Wilson-s-3769361.php.

been given as a gift on a ranch they were working. John Steinbeck, *Of Mice and Men* 92-93 (Bantam Books Mass Market Paperback 1981). Alone in a barn, the puppy's death still a secret, he complains to the dead pup, "'Now maybe George ain't gonna let me tend no rabbits, if he fin's out you got killed.'" *Id.* at 93. The lonely wife of the ranch boss's son discovers Lennie in his despair, and tries to comfort him, inviting Lennie to touch her soft hair, "'Feel right aroun' there an' see how soft it is.'" *Id.* at 99. When the woman screams because Lennie musses her hair, Lennie cups her mouth and begs her to stop. "George gonna say I done a bad thing. He aint' gonna let me tend no rabbits." *Id.* at 100. He then becomes angry, shakes her, breaks her neck, and thereby kills her. *Id.* All the while, Lennie protests that the screaming will land him in trouble with George.

The depiction of Lennie in the novella is reflected throughout the *Briseno* factors. *See also* Pet. App. at 118a (Alcala, J., dissenting) (referring to "Lennie standard"). For ease of reference, here, again (with numbers added), are the seven factors:

> (1) Did those who knew the person best during the developmental stage – his family, friends, teachers, employers, authorities – think he was mentally retarded at that time, and, if so, act in accordance with that determination?
>
> (2) Has the person formulated plans and carried them through or is his conduct impulsive?

(3) Does his conduct show leadership or does it show that he is led around by others?

(4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

(5) Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

(6) Can the person hide facts or lie effectively in his own or others' interests?

(7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Ex Parte Briseno, 135 S.W.3d at 8-9.

The factors reflect a stereotype of intellectual disability consistent with moderate or severe disability. Those with severe or even moderate intellectual disability, including Lennie, would almost certainly meet the first factor. The remaining factors all involve tasks and abilities that would be all but impossible to perform for those with severe or even moderate intellectual disability, and, of course, impossible to perform for Lennie.

The second factor measures the ability to carry out plans, as compared to acting on impulse, while the fourth asks whether conduct is rational and

appropriate. Lennie is the classic example of the person who acts on irrational impulse, rather than careful planning. He killed his victim, not by plan, but in an impulsive and irrational attempt to try to silence her to keep alive his dream of caring for the rabbits. *Of Mice and Men*, at 99-100. Similarly, Lennie smacked his puppy when the puppy "made like he's gonna bite me." *Id.* at 95. This impulsive smack killed the pup. In an earlier incident, he scared a girl whose velvet dress he was clutching. *Id.* at 12. Here, again, his actions bespoke impulsiveness, if not irrationality, and certainly no plan to frighten the girl. *Id.* at 12.

Lennie's tendency towards impulse and irrationality rather than planning is the stuff of stereotype (one, again, based on someone with a severe level of disability). But irrationality and impulsiveness are irrelevant to a valid diagnosis of intellectual disability.[13]

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[13] As shown more fully in the Brief for AAIDD as *Amicus Curiae*, there are many reasons the *Briseno* factors do not comport with medical and scientific approaches to intellectual disability. With respect to the six factors measuring various abilities, as the dissent below recognized, "weighing of positives against negatives is unlike a scientific determination of adaptive deficits, which looks solely at a person's inability to perform certain functions." Pet. App. at 119a (Alcala, J., dissenting). *See also* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Support* 7 (11th ed. 2010) (noting the following key assumption concerning the criterion of significant limitations in adaptive behavior: "Within an individual, limitations often coexist with strengths. This means that people with ID are complex human beings who likely have certain gifts as well as limitations . . . . Individuals may have capabilities and strengths that are independent of their ID (e.g., strengths in social or physical capabilities, some adaptive skill

The seventh factor asks a similar question – whether the capital offense itself involves planning, forethought, and purpose. Again, Lennie's killing evinces absolutely none of these capabilities.[14] Nor would a person fitting the common stereotype of disability be expected to possess them. *See* note 7, *supra*.

The third factor asks whether the person leads or is led by others. It is tailor made for Lennie. In the opening scene, Lennie follows George to the lake, where they will rest for the night. At the lake, Lennie "imitated George exactly" in his face-washing routine:

> [George] threw a scoop of water into his face and rubbed it about with his hand, under his chin and around the back of his neck. Then he replaced his hat, pushed himself back from the river, drew up his knees and embraced them. Lennie, who had been watching, imitated George exactly. He pushed himself back, drew up his knees, embraced them, looked over to George

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areas, or one aspect of an adaptive skill in which they otherwise show an overall limitation).") (internal quotation marks omitted)).

[14] For this and other reasons, Lennie's killing would not even qualify as capital murder in Texas. *See* Texas Penal Code § 19.02 (b)(1) (West 2015) (requiring a knowing or intentional killing for murder); Texas Penal Code § 19.03 (West 2015) (requiring for *capital* murder, a murder under § 19.02 (b)(1), plus one (or more) of several special circumstances, such as the victim is a child, police officer, judge, more than one person, or committed during the course of another felony).

> to see whether he had it just right. He pulled his hat down a little more over his eyes, the way George's hat was.

Of Mice and Men, at 3-4. As the pair later settled to relax that evening, "George lay back on the sand and crossed his hands under his head, and Lennie imitated him, raising his head to see whether he were doing it right." *Id.* at 7.

The next day, at the farm's bunkhouse, "George lifted his tick [mattress] and looked underneath it. He leaned over and inspected the sacking closely. Immediately Lennie got up and did the same with his bed." *Id.* at 21.

The fifth factor looks for rational and coherent communication, as opposed to responses wandering from subject to subject. Lennie, of course, lacks this ability. On a night when George leaves the farm for town, Lennie finds himself lonely and finally in conversation with Crooks, a black man who works in the stable. *Id.* at 76. Hearing the racial angst Crooks describes of his life as the only black person on a segregated farm, all Lennie can do is keep asking when George will return. *Id.* at 80.

Later, when Crooks reminisces about his life as a child when his family worked their own farm, Lennie's contribution is this: "George says we're gonna have alfalfa for the rabbits." *Id.* at 81.

Back at the lake in the opening scene, George is telling Lennie that his Aunt Clara would not want him to run off on his own. Lennie responds, "Tell me – like you done before . . . About the rabbits." *Id.* at 14.

The sixth factor looks at a person's ability to hide facts or lie. This factor, too, appears written with Lennie as the paradigm of severe disability. In the opening scene, Lennie secretly carries a dead mouse in his pocket, whose fur he is stroking. He tries to keep this fact from George, knowing he would not approve. But George of course is on to him, and tells Lennie to hand it over so he can throw it out. Lennie protests, "'I ain't got nothin', George. Honest.'" *Id.* at 5. George sees Lennie's lie, demands the mouse, and then throws it towards the water. *Id.* at 6. Moments later, Lennie tries to retrieve his dear dead mouse without George noticing, again lies to conceal it, and again George seizes it to throw it away. *Id.* at 9-10.

A similar scene replays when Lennie defies George to sneak his cute new puppy away from its nursing mother and the litter, into the bunk house. Lennie lies on his bunk, facing the wall, cradling the pup to his chest. When George reminds Lennie he had told him not to bring the pup into the bunk house, Lennie cries, "What pup, George, I ain't got no pup." *Id.* at 47. George promptly approaches Lennie's bunk, turns Lennie towards him, and grabs the pup from his hiding spot. *Id.*

Modeled on Lenny, these six *Briseno* factors exemplify a stereotype, based on the capabilities of persons with severe disability. But they find no support in science. *See* note 13, *supra* (explaining the analysis is to measure significant deficits not to weigh positive capabilities against negatives).

The first *Briseno* factor involves a different mode of analysis. It inquires not into abilities, but the perception of others. When the defendant was a

child, did the people who knew him best think he was intellectually disabled and act in accordance? This includes "family, friends, teachers, employers, authorities." *Ex Parte Briseno*, 135 S.W.3d at 8.

Here, again, Lennie seems to readily qualify, and to represent the stereotype. In the depression era, Lennie's Aunt Clara left him in the care of George before she died because he could not care for himself. *Of Mice and Men*, at 14, 44. She told Lennie "'Min' George because he's such a nice fella an' good to you.'" *Id.* at 111.

But stereotypes are not science. This factor improperly elevates family members, friends, and others to the level of experts. For people who are moderately, severely, or profoundly disabled, it is of course likely that teachers, friends, and loved ones would notice the disability, as Aunt Clara and George did. There are reasons mild intellectual disability, however, may not come to the attention of family members or even educators. For one, many people with intellectual disability also come from families with low intellectual functioning or even disability, where mild intellectual disability is not recognized.[15] Second, even without their own disabilities, family, friends, and even educators may not know how to identify behavior that would

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[15] See, e.g., Michael Rutter, Emily Simonoff & Robert Plomin, *Genetic Influences on Mild Mental Retardation: Concepts, Findings and Research Implications*, 28 J. Biosocial Sci. 509, 509 (Oct. 1996) ("It has long been known that mild mental retardation . . . shows a strong tendency to run in families and that there is a much increased recurrence risk if either a parent or a sibling has mental retardation.").

suggest intellectual disability, particularly in the mild range, and could miss it for myriad of reasons.[16]

Third, the common stereotype of intellectual disability – as a Lennie or a Forrest Gump – can cause shame and discourage reporting. Persons with mild intellectual disability, their family members, and even educators, may thus be motivated to avoid the label.[17] The first *Briseno* factor therefore

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[16] "Frequently," those with mild intellectual disability "have no identifiable cause for the disability, they are physically indistinguishable from the general population, they have no definite behavioral features, and their personalities vary widely, as is true of all people." *Intellectual Disability: Definition, Classification, and Systems of Support* 151.

[17] As mental health professionals have long understood, "because of the powerful stigma attached to mental illness or developmental disabilities, [affected] individuals and their families will take extreme measures to hide those disabilities." James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 430-31 (1985). Moreover, "[d]iagnoses of children who have ID may be erroneous for many reasons; but one significant reason is parental reluctance to accept, and teacher/psychologist reluctance to give, a label (e.g., 'mentally retarded') that may persist throughout a child's life and may have many negative consequences[.]" Dennis Keyes and David Freedman, *Retrospective Diagnosis and Malingering, in The Death Penalty and Intellectual Disability* 263, 265. Educators may consider such labels "derogatory and of limited educational value," and thus may use less-objectionable alternatives. *Id.* *See also* Siperstein & Collins, *Intellectual Disability, in The Death Penalty and Intellectual Disability* 29 ("Despite the importance of early intervention, there is often reluctance to diagnose a child with ID, as parents do not perceive their child's impairment to be significant enough to warrant diagnosis."); *Intellectual Disability: Definition, Classification, and Systems of Support* 160 (similar).

potentially excludes defendants from *Atkins* protection who sought as children (or whose families sought) to avoid the negative stereotypes associated with intellectual disability. As shown above, these are stereotypes the *Briseno* opinion itself perversely reinforces.

B. By Relying On Stereotypes, the *Briseno* Factors Lead To Unreliable And Arbitrary Decision Making That Deprives Defendants With Intellectual Disability Of Their Individual Dignity.

Texas may not impose hurdles on prisoners seeking *Atkins* protection that "deny [them] the basic dignity the Constitution protects." *Hall*, 134 S. Ct. at 2001. It may not impose hurdles that render the *Atkins* inquiry unreliable, as based on a factfinder's caprice or whimsy. *See Beck*, 447 U.S. at 638 ("To insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination.") (internal quotation marks and citation omitted). And it may not rely on a procedure that introduces arbitrariness into the question of who lives and who dies. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).[18]

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[18] As shown in Petitioner's merits brief and other *amicus curiae* briefs, Texas also may not continue to "disregard [the] informed assessments" of medical experts. *Hall*, 134 S. Ct. at 2000. *Amici* acknowledge those important arguments but do not repeat them in the complementary presentation here.

The *Briseno* factors flunk all of these tests because they rest on a stereotyped view of the capabilities of people who are intellectually disabled, based if anything on a caricature from literature.

As judges dissenting from their application have explained, the *Briseno* factors are "decidedly non-diagnostic,"[19] afford Texas judges "amorphous latitude . . . to supply the normative judgment to say, in essence, what mental retardation means in Texas (and, indeed, in the individual case) for Eighth Amendment purposes[,]"[20] and render the *Atkins* "protection meaningless" because they are not "moored to a generally agreed upon definition of 'mental retardation.'"[21] By contrast, this Court's *Atkins* decision to exempt categorically those with intellectual disability from the death penalty rested on the recognition that factfinders may not always treat the disability as mitigating. 536 U.S. at 320-21.

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[19] *Ex parte Cathey*, 451 S.W.3d 1, 28 (Tex. Crim. App. 2014) (Price, J., concurring in part).

[20] *Lizcano v. State*, No. AP-75879, 2010 WL 1817772, *35 (Tex. Crim. App. May 5, 2010) (Price, J., concurring and dissenting).

[21] *Chester*, 666 F.3d at 367, 371 (Dennis, J., dissenting). *See also* John Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J. Law & Pub. Pol'y 689, 710-17 (2009); Blume et al., *A Tale of Two (And Possibly Three)* Atkins, 23 Wm. & Mary Bill Rts. J. 393, 399-400 (2015); Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-*Atkins *Claims of Mental Retardation*, 39 Hastings Const. L.Q. 1, 149-66, 173-74 (2011); Stephen Greenspan & Harvey N. Switzky, *Lessons from the* Atkins *Decision for the Next AAMR Manual*, in AAMR, What is Mental Retardation? Ideas for an Evolving Disability in the 21st Century 291 (2006); Greenspan, *The* Briseno *Factors, in The Death Penalty and Intellectual Disability* 219.

Here, the trial court found Petitioner to have met the three traditional criteria for intellectual disability, finding he had significantly subaverage intellectual functioning with a full-scale IQ of approximately 70, significant deficits in adaptive functioning in the conceptual, social and practical realms, and an age of onset during the developmental period when he failed the first grade twice and every grade thereafter but was "socially promoted." *See* Pet. App. at 39a-40a, 184a. *See also* Petitioner's Brief at 15-17 (describing this evidence in further detail).

Rejecting the trial court's findings, the CCA cited the *Briseno* factors as a basis for denying Petitioner's *Atkins* claim. Pet. App. at 89a-91a (citing anecdotal evidence of *Briseno*-type abilities in planning, rational communications, and lying – all related to the crime and his participation in his defense).

Whatever their source, there can be no doubt that the *Briseno* factors are based on inaccurate and damaging stereotypes. *See* n.6, *supra* (showing overwhelming majority of those with intellectual disability are mildly disabled); n.17, *supra* (noting the stigma associated with the stereotype of *severe* disability discourages identification as intellectually disabled altogether). Unrepresentative, the stereotypes are based on the most severe cases of intellectual disability. It is wrong on several levels to require a defendant seeking exemption from execution under the Eighth and Fourteenth Amendments to live up (or, rather, down) to such a standard.

Briseno "risks executing a person who suffers from intellectual disability." *Hall*, 134 S. Ct. at 2001. It could not be less reliable. *Beck*, 447 U.S. at 638. Applied to foreclose *Atkins* relief in Texas only, Brief for The Constitution Project as *Amicus Curiae*, it could not be more arbitrary. *Gregg*, 428 U.S. at 195. And it is difficult to imagine anything more degrading to a person's dignity than to require him to meet an inaccurate and hurtful stereotype of disability to secure a constitutional protection to save his life. *Hall*, 134 S. Ct. at 2001.

CONCLUSION

The judgment below should be reversed.

Respectfully Submitted,

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